

## **Brixen, Eugene**

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### **PERMANENT TOTAL DISABILITY (RCW 51.08.160)**

#### **Part-time employment**

An odd lot worker capable of obtaining and performing only part-time or half-time work is not necessarily precluded from permanent total disability status. ...*In re Eugene Brixen*, BIIA Dec., 63,381 (1984)

Scroll down for order.



1 scapula; compound spiral fracture of the left tibia and fibula; traumatic injury to both knees  
2 (including the aggravation of a pre-existing asymptomatic left knee condition; an internal right hand  
3 injury; and ulnar neuropathy in the left arm and hand. By the time the claim was ultimately closed  
4 on November 5, 1982, Mr. Brixen had undergone six surgeries and exhibited residuals of several  
5 conditions including lumbar disc degeneration with hypertrophic changes in the lumbar spine, the  
6 aggravation of pre-existing asymptomatic cervical disc degeneration, chronic cervical and lumbar  
7 strains, chondromalacia in the knees, the closure of a large hole in the left leg by a skin graft, and a  
8 psychiatric condition.  
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13 On November 5, 1982, the Department issued its order closing the claim with awards for  
14 permanent partial disability for conditions in his neck, low back, both legs, left arm, and for  
15 impairment of mental health.  
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18 Many years before his January 30, 1978 injury, Mr. Brixen had injured his left knee. That  
19 injury required him to undergo surgery on ligaments performed by a Dr. Brown in Spokane. Mr.  
20 Brixen testified that he was off work for some eleven months following that injury and that for two  
21 years thereafter, he had performed physically less demanding jobs such as truck driving rather than  
22 his customary logging work.  
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25 In 1975, the claimant cut his left hand with a chain saw. This injury required the claimant to  
26 lose two months from work and the claim was ultimately closed with a permanent partial disability  
27 award.  
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30 It is well established in the law of this state that if a person is impaired by a physical or  
31 mental condition which pre-existed the occurrence of an industrial injury, and later is prevented  
32 from return- ing to gainful employment because of the added or combined effects of a later  
33 occurring industrial injury, the worker is then entitled to compensation as a permanently totally  
34 disabled worker. Wendt v. Department of Labor and Industries, 18 Wn. App. 674 (1977). The prior  
35 injury or disability is viewed not as the cause of the total disability, but merely a condition upon  
36 which the subsequent injury combined to cause permanent total disability. See Erickson v.  
37 Department of Labor and Industries, 48 Wn. 2d 458 (1956) and Miller v. Department of Labor and  
38 Industries, 200 Wash. 674 (1939).  
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43 The claimant is also entitled, when the issue of his capacity for employment is being  
44 determined, to a consideration of certain socio- economic factors: age, level of education, history of  
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1 prior employment, and the feasibility of vocational retraining. Pacific Car and Foundry Co. v. Coby,  
2 5 Wn. App. 547 (1971).  
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4 The court in Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191, 196 (1942), had  
5 occasion to interpret the predecessor of RCW 51.08.160, defining permanent total disability. That  
6 definition now reads materially the same as it did then. The Kuhnle court pointed out that  
7 permanent total disability, as defined by the statute, does not require a workman to be absolutely  
8 helpless. Furthermore, Kuhnle pioneered the rule that if an accident leaves the workman in such a  
9 condition that he can no longer follow his previous occupation, or any other similar occupation, and  
10 is fitted only to perform "odd jobs" or special work, not generally available, the burden shifts to the  
11 Department to show that there is such special work that he can in fact obtain.  
12

13 Primarily through the testimony of Dr. Wayne W. Zimmerman and Frank C. Swinehart, Mr.  
14 Brixen has presented convincing evidence which establishes that, on the closing date, the only type  
15 of work he was capable of obtaining and performing squarely fits the category of "odd lot"  
16 employment.  
17

18 Franklin M. Dare, a vocational rehabilitation counselor employed by the Department, testified  
19 that part-time or half-time work, within the claimant's physical capabilities, was available to Mr.  
20 Brixen.  
21

22 In our opinion, the phrase "or other condition permanently incapacitating the worker from  
23 performing any work at any gainful occupation", found in RCW 51.08.160, does not necessarily  
24 preclude an injured worker from permanent total disability status when he is capable only of  
25 obtaining and performing part-time or half-time work.  
26

27 We conclude that the Department has failed to carry its required burden of showing that "odd  
28 lot" or special employment, suitable to this claimant's very substantial residual disability, is in fact  
29 available to him. Allen v. Department of Labor and Industries, 16 Wn. App. 692, 693 (1977).  
30

31 The proposed findings, conclusions and order are hereby stricken and replaced by those  
32 that follow.  
33

### 34 **FINDINGS OF FACT**

- 35 1. On February 6, 1978, the Department of Labor and Industries received  
36 an accident report in which it was alleged that Eugene A. Brixen, the  
37 claimant herein, had sustained an industrial injury on January 30, 1978  
38 while in the course of his employment with John R. Barnett. The claim  
39 was accepted, medical treatment provided, and time-loss compensation  
40 was paid. On August 4, 1982, the department issued an order closing  
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1 the claim with permanent partial disability awards of 25% as compared  
2 to total bodily impairment for cervical and dorsolumbar impairment (10%  
3 for cervical and 15% for dorsolumbar), 10% as compared to total bodily  
4 impairment for psychiatric impairment, 15% of the amputation value of  
5 the left leg at or above the knee with functional stump, 18% of the  
6 amputation value of the right leg at or above the knee with functional  
7 stump, 5% of the amputation value of the left arm at or above the deltoid  
8 insertion or by disarticulation at the shoulder. On September 17, 1982,  
9 the claimant filed a notice of appeal with the Board of Industrial  
10 Insurance Appeals. On September 27, 1982, the Department issued an  
11 order holding in abeyance its previous order dated August 4, 1982,  
12 pending further investigation. On September 28, 1982, this Board  
13 issued its order returning the case to the Department for further action.  
14 On November 5, 1982, the Department issued an order adhering to the  
15 provisions of its previous order dated August 4, 1982. On November 10,  
16 1982, the claimant filed a notice of appeal with this Board. On  
17 November 30, 1982, the Board issued its order granting the appeal,  
18 assigning it Docket No. 63,381, and directing that proceedings be held  
19 on the issue contained therein.

- 20  
21 2. On January 30, 1978, the claimant was injured during the course of  
22 employment when he was hit by a falling dead snag. As a result he  
23 sustained the following injuries: a compression fracture of the twelfth  
24 dorsal vertebra; a fracture of the transverse process of the third lumbar  
25 vertebra; the aggravation of a previously asymptomatic spondylosis into  
26 a first degree spondylolisthesis at the interspace between the fifth  
27 lumbar and first sacral vertebrae; multiple fractures of the ribs in the left  
28 chest; fracture of the left scapula; compound spiral fracture of the left  
29 tibia and fibula; internal injuries to both knees, including the aggravation  
30 of the pre-existing asymptomatic left knee condition; internal injuries to  
31 the right hand, requiring exploratory surgery; ulnar neuropathy to the left  
32 arm and hand; lumbar disc degeneration with hypertrophic changes in  
33 the lumbar spine, the aggravation of a pre-existing, asymptomatic  
34 cervical disc degeneration; a condition diagnosed as chondromalacia in  
35 the knees; the closure of a large hole in the left leg by a skin graft; a  
36 psychiatric condition; and some six surgeries in treatment of the  
37 foregoing.
- 38 3. In the early 1960's, the claimant had sustained an injury to his left knee  
39 which required surgical repair. The injury kept the claimant off work for  
40 some eleven months, and required the claimant to seek lighter  
41 employment for the ensuing two years. The left knee had returned to an  
42 asymptomatic condition and remained as such until aggravated by the  
43 claimant's industrial injury of January 30, 1978.
- 44 4. In 1975, the claimant sustained an industrial injury involving a cut in his  
45 left hand with a chain saw which prevented the claimant from working  
46 for approximately two months. This claim was ultimately closed with a  
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1 permanent partial disability award equal to 20% of the amputation value  
2 of the arm at the wrist.

3  
4 5. The claimant is fifty-three years of age, has a high school education,  
5 and has a lifetime history of employment primarily limited to manual  
6 labor. On November 5, 1982, the claimant was not a suitable candidate  
7 for vocational rehabilitation.

8 6. On November 5, 1982, as a result of his industrial injury of January 30,  
9 1978, the claimant had among others the following residual conditions:  
10 healed compression of the twelfth dorsal and of the transverse process  
11 of the third lumbar vertebra; the aggravation of a pre-existing  
12 asymptomatic spondylosis into a first degree spondylolisthesis at the  
13 interspace between the fifth lumbar and the first sacral vertebra; healed  
14 multiple fractures of the ribs in the left chest; healed fracture of the left  
15 scapula; healed compound spiral fractures of the left tibia and fibula,  
16 which had required surgical corrections; internal injury to both knees,  
17 including the aggravation of a pre-existing asymptomatic left knee  
18 condition, requiring three surgeries including a tibia transplant; internal  
19 injury to the right hand requiring exploratory surgery; ulnar neuropathy to  
20 the left arm and hand; lumbar disc degeneration with hypertrophic  
21 changes in the lumbar spine, the aggravation of pre-existing, minor  
22 asymptomatic cervical disc degeneration; early chondromalacia in the  
23 knees; the closure of a large hole in the left leg by a skin graft; chronic  
24 cervical and lumbar strains; and a psychiatric condition. All of these  
25 conditions were fixed and further treatment was not indicated. On  
26 November 5, 1982, the claimant's residual permanent partial disability,  
27 attributable to each of these conditions standing alone, was as follows:  
28 25% as compared to total bodily impairment for the cervical and  
29 dorsolumbar conditions, consisting of 10% for cervical and 15% for  
30 dorsolumbar; 15% of the amputation value of the left leg at or above the  
31 knee with functional stump; 18% of the amputation value of the right leg  
32 at or above the knee with functional stump; 5% of the amputation value  
33 of the left arm at or above the deltoid insertion or by disarticulation at the  
34 shoulder; and 10% as compared to total bodily impairment for the  
35 psychiatric condition. Standing alone, the foregoing conditions did not  
36 permanently prevent the claimant from performing a full-time gainful  
37 occupation on a reasonably continuous basis.

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39 7. As of November 5, 1982, when the claimant's above-described  
40 permanent impairments attributable to his injury of January 30, 1978,  
41 were superimposed upon and combined with his permanent impairment  
42 resulting from his left knee injury in the early 1960's, and the chain saw  
43 injury to his left hand in 1975, and when considered with the factors of  
44 the claimant's age, education, history of employment, and poor  
45 retraining prognosis, the claimant was permanently prevented from  
46 obtaining and performing any gainful occupation on a reasonably  
47 continuous basis other than that of an "odd lot" classification.

1 8. As of November 5, 1982, gainful employment commensurate with the  
2 claimant's qualifications and abilities, and in keeping with his numerous  
3 injury-caused impairment, was not available to him.

4  
5 **CONCLUSIONS OF LAW**

- 6 1. This Board has jurisdiction of the subject matter and the parties to this  
7 appeal.  
8  
9 2. As of November 5, 1982, as a proximate result of his industrial injury of  
10 January 30, 1978, the claimant was a permanently totally disabled  
11 worker within the definition and contemplation of RCW 51.08.160.  
12  
13 3. The order of the Department of Labor and Industries issued November  
14 5, 1982, which adhered to the provisions of a previous order dated  
15 August 4, 1982, closing the claim with permanent partial disability  
16 awards equal to 25% for cervical and dorsolumbar impairment, 15% of  
17 the amputation value of the left leg at or above the knee with functional  
18 stump, 18% of the amputation value of the right leg at or above the knee  
19 with functional stump, 5% of the amputation value of the left arm at or  
20 above the deltoid insertion or by disarticulation at the shoulder, and 10%  
21 for psychiatric impairment, is incorrect, should be reversed, and the  
22 claim remanded to the Department with direction to accord the claimant  
23 the status of a permanently totally disabled worker, effective November  
24 5, 1982, with all of the benefits incident with that status.

25 It is so ORDERED.

26 Dated this 3rd day of January, 1984.

27 BOARD OF INDUSTRIAL INSURANCE APPEALS

28  
29 /s/ \_\_\_\_\_  
30 MICHAEL L. HALL Chairman

31  
32 /s/ \_\_\_\_\_  
33 FRANK E. FENNERTY, JR. Member  
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